Subcommittee on Energy and Power
Committee on Energy and Commerce
United States House of Representatives
Hearing on the "North American Energy Infrastructure Act"
H.R. 3301

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Introduction

Mr. Chairman, Ranking Member, and members of the Subcommittee, thank you very much for this public hearing on H.R. 3301, which addresses the importance of effective and fair crude oil pipeline regulation.

My name is Paul Blackburn and I am an attorney in private practice and the principal of Blackcreek Environmental Consulting. Although I have represented and continue to represent landowner groups and national and local environmental organizations on matters related to pipeline permitting and safety, I do not speak on behalf of any organization today, nor have my comments been subject to approval by anyone other than myself.

I represented Dakota Rural Action, a nonprofit organization that represents ranchers and farmers throughout South Dakota, during the South Dakota Public Utilities Commission hearing on the Keystone XL Pipeline. I also prepared comments on draft and final environmental impact statements prepared pursuant to the National Environmental Policy Act review of the Keystone XL Pipeline, and have authored reports on defective pipe steel and the lack of adequate oil spill response planning and preparation in the northern Great Plains. Perhaps most importantly, I have spoken to and with hundreds of landowners whose private property may be taken by the

government to allow construction of the proposed Keystone XL Pipeline. These persons are also regulated entities and their rights and freedoms must be respected.

Much is made of the impact of government regulation on TransCanada, the proponent of the proposed Keystone XL Pipeline. Actually, the government offers it a pretty sweet deal, because if its pipeline is approved TransCanada gets to condemn thousands of parcels of private property and the federal government guarantees it a profit on its pipeline regardless of how much or how little it is used, how badly it is managed, or how much damage it does if it ruptures. Thanks to federal regulation, pipeline companies operate with very little commercial risk, because these risks are offloaded onto consumers by the Federal Energy Regulatory Commission ("FERC").

Much less concern is expressed for the potentially severe and permanent impacts of this proposed pipeline on landowners along the route and their families, farms, ranches, businesses, communities, and environment, including our global climate. Receiving a condemnation notice in the mail means that a landowner will likely spend scores, if not hundreds of hours – involuntarily – to help a major multinational corporation advance its private financial interests. Landowners also spend thousands and thousands of dollars on legal representation and experts, which costs are not paid for by tax dollars or passed onto consumers through pipeline tariffs.

Similarly, millions of other citizens are concerned about the Keystone XL Pipeline's climate change impacts, risk of oil spills, and other adverse environmental and health impacts in Alberta and along the pipeline. They have found that this pipeline would represent a decades-long commitment by our country to the dirtiest most damaging oil production on the planet, and that there are many serious environmental consequences that must be avoided. Regardless of one's position on this pipeline, such citizen commitment should be respected.

Landowners and other citizens have a right to protect their interests in a fair process, but taken as a whole the regulatory process for the Keystone XL Pipeline – other than the Environmental Impact Statement review – has been unstructured, chaotic, and heavily biased against them. The National Environmental Policy Act review was extensive not because something is wrong with it, but because it reflects a deeper dysfunction arising from a lack of federal permitting for crude oil pipelines, such as exists for natural gas pipelines. For citizens and landowners, the most rational and useful part of the Keystone XL Pipeline review process has been its environmental review, because it provided them with information and opportunities to be heard on environmental and social issues when none others existed. The Subcommittee's action on H.R. 3301 has the potential to demonstrate its respect for the burdens that pipeline companies may force landowners to bear, or to demonstrate its disregard for their rights and freedoms.

H.R. 3301 Makes a Flawed Process Worse

H.R. 3301, Section 2, states:

> Congress finds that the United States should establish a more uniform, transparent, and modern process for the construction, connection, operation, and maintenance of oil and natural gas pipelines and electric transmission facilities for the import and export of oil, natural gas, and electricity to and from Canada and Mexico, in pursuit of a more secure and efficient North American energy market.

I agree that a more uniform, transparent, and modern process is needed, because the current permitting process is scattered among too many states and federal agencies, and is therefore unpredictable. As I have told many, many landowners, the current permitting "structure," and I use this term loosely, is a structure that only a pipeline industry attorney could love.

Typically, the "regulatory compact" between energy utilities and the public requires that a utility prove that a project is needed and that it commit to mitigate harm caused to citizens and the environment, in exchange for which it is granted the privilege of taking private property and the legal right to guaranteed profits through a government-approved tariff structure. For regulated electric and natural gas utilities, this compact is usually arbitrated by a single agency that is responsible for determining need, route, location, mitigation, reasonableness of cost, and future tariff rates. Such agency also usually authorizes takings of private property if the project is approved. For example, FERC is essentially a one-stop shop for interstate natural gas pipeline permitting. Although other agencies are certainly involved in natural gas pipeline approvals, at least there is centralized coordination of the process.

In contrast, interstate crude oil pipeline regulation involves dozens of state and federal agencies with indistinct and overlapping responsibilities – and no one agency has overall management authority. Most citizens find this situation very confusing and ineffective.

To protect landowners, I suggest that the Subcommittee consider H.R. 3301 in a broader regulatory context. The bill, as drafted, incorrectly focuses on only a small corner of this regulatory morass, and relatively speaking not one that is particularly important. Therefore, the Subcommittee should not focus on the Presidential Permit process in isolation, but should also consider a number of more important regulatory issues, including the following.

1. No Coordination Among the States and with the Federal Government with Regard to Determination of the Need for Interstate Crude Oil Pipelines Resulting in Premature Pipeline Construction and Increased Costs at the Pump

Most rate-regulated utilities must prove to a regulator that new infrastructure is needed and is reasonably priced before the regulator commits the public to paying for the project through tariffs. Absent such review, there is a great risk that utilities would construct projects

not because they are needed, but to increase tariff-based profits. In contrast, crude oil pipelines are regulated through a bizarre mechanism in which individual states may determine the need for interstate pipelines (most do not), but FERC approves tariffs without meaningful review of project need or cost. Even though some states may consider need, there is doubt about their authority, given the Constitution's Interstate Commerce Clause, to determine whether an interstate pipeline is needed. The failure to conduct a robust national need evaluation before committing consumers to pay for pipelines has resulted in unneeded pipeline capacity and increased consumer cost.

That the lack of federal review of pipeline need is a problem is shown by *Petition of Suncor Energy Marketing Inc. for Declaratory Order and Establishment of Near-Term Rate Treatment*, FERC Docket No. OR10-5-000 (Jan. 13, 2010). In this petition, Suncor, joined by Imperial Oil, Husky, Citgo, Flint Hills, Nova Chemical, Total, Marathon, and Canadian Oil Sands (all shippers of crude oil on Enbridge pipelines) asserted that Enbridge should not have started construction of the Alberta Clipper Pipeline when it did because it was not needed. Suncor stated:

> [S]hippers will experience annual rate increases on the Lakehead System (through implementation of the Alberta Clipper Surcharge) of 23% to 30% (based on 2009 rates), which will result in a total additional payment to Enbridge of $965 million over the first five years of the Alberta Clipper's operation. Over $428 million of these payments represent Enbridge's embedded profit. Shippers will have paid Enbridge hundreds of millions of dollars before they reach the point (if ever) where the operational benefits of the Alberta Clipper justify their cost.

Id. at 22-23 (footnotes omitted; emphasis added). Suncor added:

> Shippers will pay Enbridge nearly a billion dollars in increased Lakehead System rates over the first five years of the Alberta Clipper's operation (representing $428 million in Enbridge's

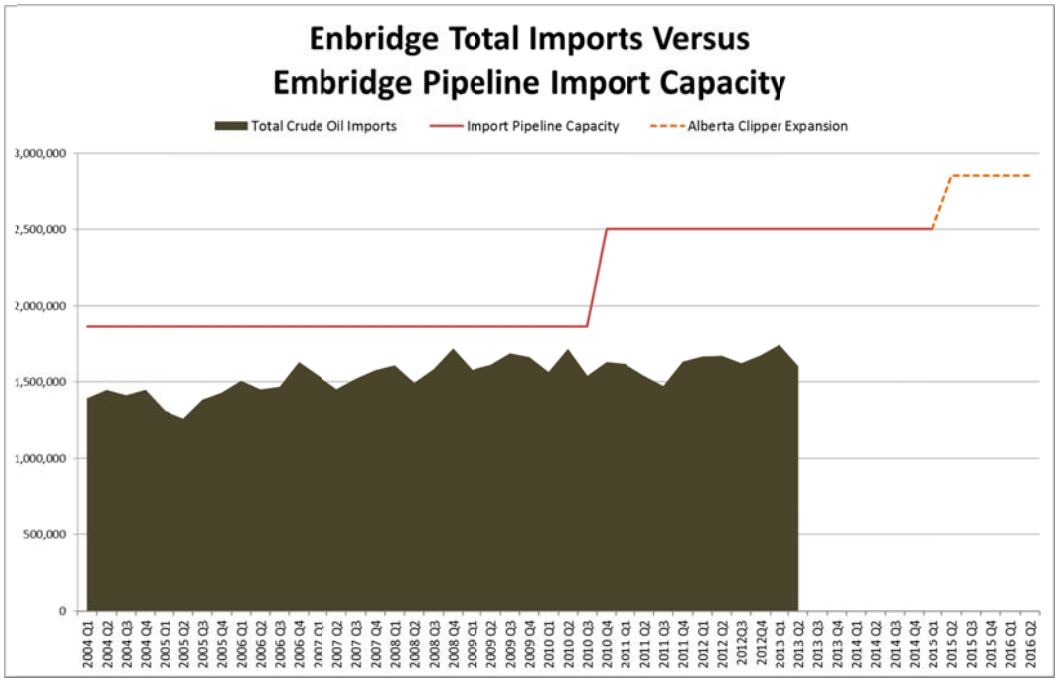
> embedded profit) for poorer service and greatly diminished savings.

Id. at 30. Thus, according to Suncor, Enbridge built the Alberta Clipper Pipeline prematurely, resulting in hundreds of millions of dollars in excess shipping costs.

In response, FERC did not review the petition on its merits. It merely ruled that the shippers should have requested that Enbridge not construct the pipeline sooner than they did. FERC did not consider the potential financial impacts of premature construction on consumer pocketbooks.

FERC data since the Suncor Petition was filed shows that the Alberta Clipper Pipeline was in fact built prematurely, because, as shown in Figure 1, below, imports on Enbridge pipelines have been almost flat since 2008.

Figure 1



At the same time, the FERC-approved tariffs have approximately doubled, for example, Figure 2 shows the tariff rate from the international border to Lockport, IL.

Figure 2

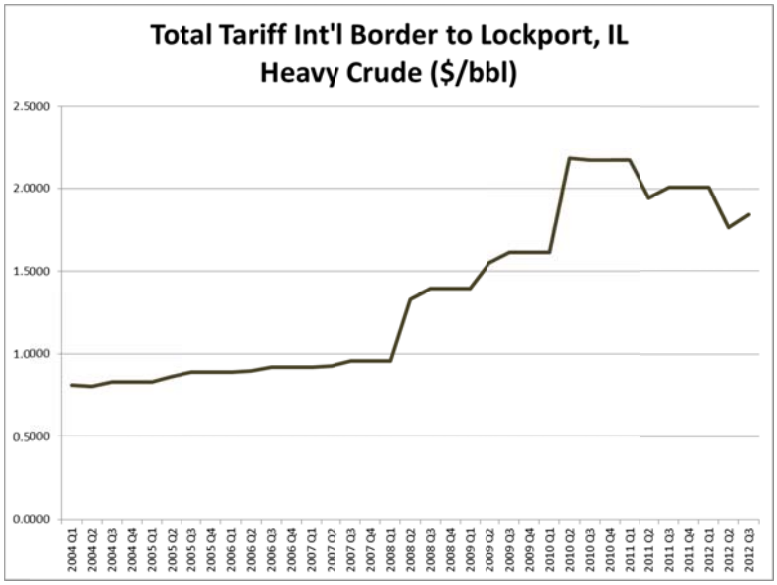
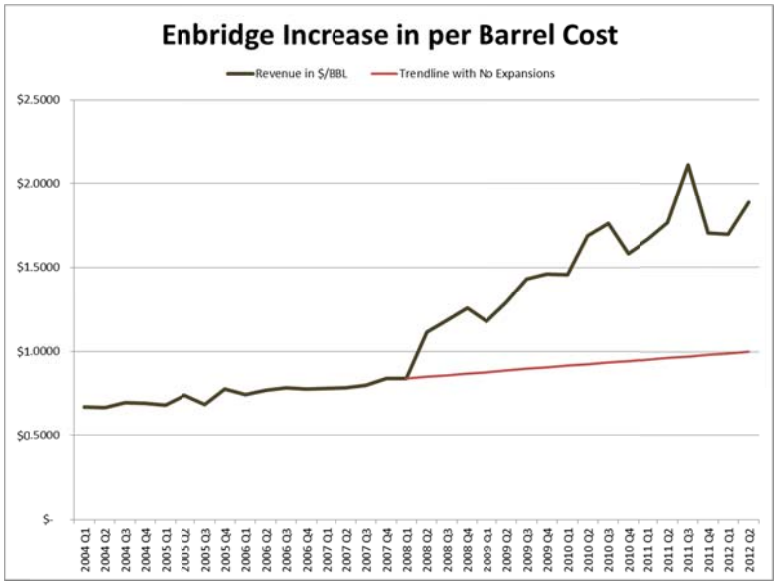


Figure 3 shows that Enbridge's revenues have skyrocketed.

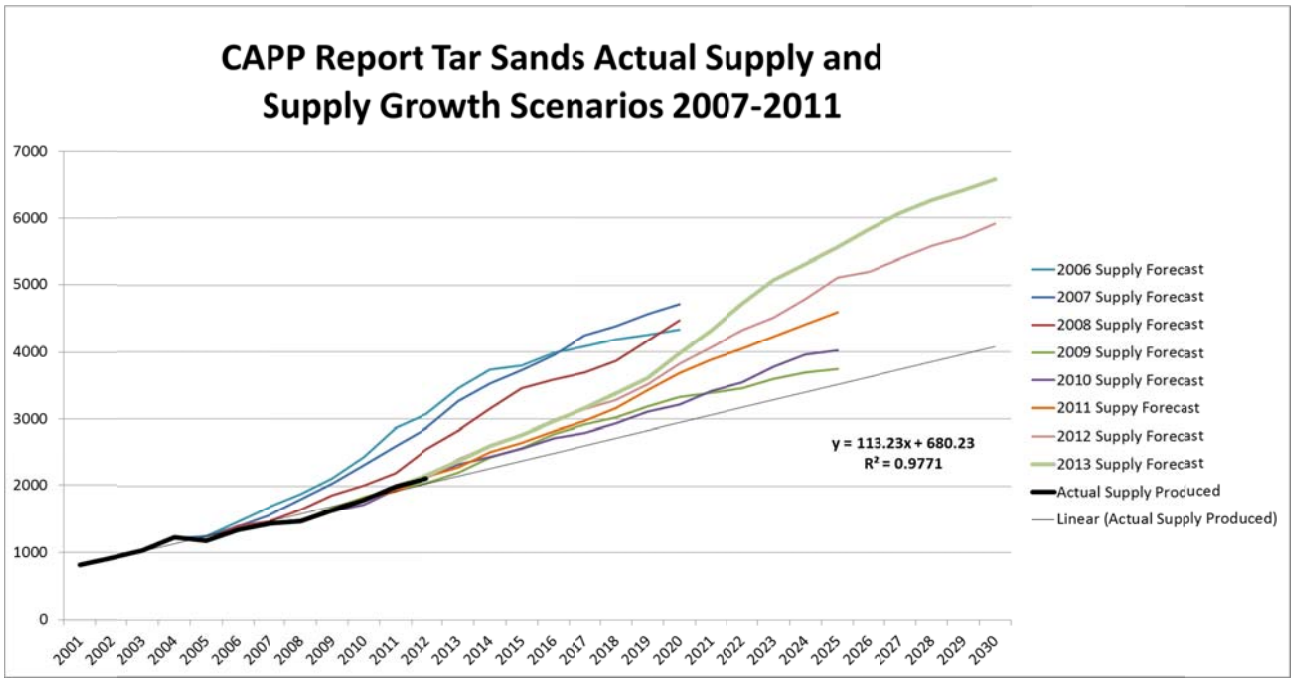
Figure 3



The reason that the Alberta Clipper Pipeline was built prematurely was only partially related to the economic recession. Another reason is the fact that the Alberta Clipper Pipeline started operations at almost the same time as the first Keystone Pipeline, such that too much import capacity was brought online simultaneously relative to market needs. Figure 4 charts data from

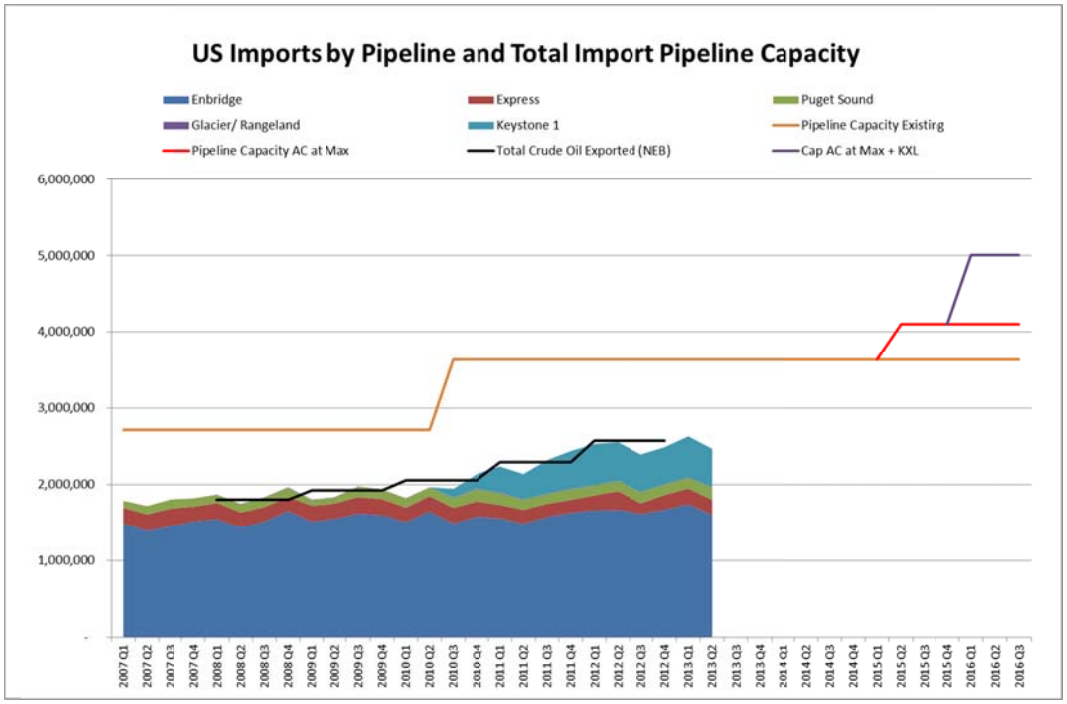
the Canadian Association of Petroleum Producers ("CAPP") showing that supply growth from the Tar Sands has been steady over the past decade, such that demand for new pipeline capacity is predictable, averaging about 113,000 bpd greater supply every year. To be clear, not all Canadian supply is exported to the U.S.; some of it remains in Canada.

Figure 4



Since the growth in new supply from Canada is limited, market demand for new pipeline capacity is also limited, and TransCanada and Enbridge are competing to transport this limited new supply. As shown by the following chart, the vast majority of new imports from Canada since construction of the Alberta Clipper Pipeline have flowed through the Keystone Pipeline.

Figure 5



TransCanada's success in taking new market share from Enbridge was probably due to TransCanada's novel commercial approach that relies on very long term take-or-pay (use-it-or-lose-it) contracts. These contracts give TransCanada's shippers a substantial financial incentive to use the Keystone Pipeline instead of the Enbridge system. This being said, TransCanada constructed the Keystone Pipeline with an approximate 100% cost overrun, due largely to increased materials and labor costs because of competition for these resources with other pipeline companies, including Enbridge. These cost overruns from unnecessary competition are being passed onto consumers.

It is likely that increased shipments of crude oil from the Bakken Formation have helped mitigate Enbridge tariff increases, but due to rail and competing pipelines the net increase in flow of Bakken oil on Enbridge's system has been limited.

Moreover, if the proposed Keystone XL Pipeline had been brought online in 2012, and assuming that TransCanada's commercial structure continued to give it advantage over Enbridge,

the likely result would have been dramatically decreased utilization of the Enbridge system, and even greater losses for Enbridge's shippers and, ultimately, consumers. Thus, delay of the Keystone XL Pipeline has probably saved U.S. fuel consumers hundreds of millions of dollars in excess tariff costs. Looking to the future, if the proposed Keystone XL Pipeline comes online at about the same time that Enbridge completes its similarly-sized expansions to the Gulf Coast (expansions of Lines 61 and 67, and Seaway and construction of Flanagan South), together totaling approximately 1.7 million bpd of new capacity, then it is likely that consumers will pay billions at the pump for prematurely constructed pipeline capacity. From a purely commercial point of view, it makes no sense to bring this much new pipeline capacity onto the market at the same time.

Although the media frames the conflict over the Keystone XL Pipeline as relating only to Administration delay to appease environmental activists, this delay has also provided great benefit to TransCanada's chief competitor, Enbridge, and the crude oil shippers who rely on its monopoly services.

Ultimately, consumers pay for the lack of a comprehensive federal permitting process. The economic waste caused by premature construction of the Alberta Clipper Pipeline could have been prevented if federal law required FERC to confirm that a pipeline is needed before it is constructed, as happens for most rate-regulated utilities. In addition, it appears that neither state agencies nor FERC review project costs before they are rate-based, such that consumers have no assurance that they are not paying for bloated development and construction budgets.

2. A Lack of Clarity about the Roles of Federal and State Agencies

There is no lead federal agency for crude oil pipeline regulation. Instead, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") regulates pipeline safety, PHMSA and the U.S. Environmental Protection Agency spilt oil spill response authority, FERC regulates rates, DOS regulates international crossings, and a variety of federal agencies regulate specific matters.

States may or may not regulate new crude oil pipelines. Those that do variously regulate routing, siting/mitigation, determination of need, pipeline safety (if delegated), oil spill response, and various pollution issues. Local governments may also regulate pipelines through zoning laws, franchise agreements, pipeline abandonment, and other matters.

Sorting out which agency is responsible for what requires a law degree, days of research, and regulatory experience, that landowners and other citizens rarely have. Even with careful research, vague laws and regulations at all levels create ongoing questions and uncertainties in the overall regulatory process that breed only suspicion and distrust among citizens. Since oil pipeline executives carry regulatory attorneys 24/7 in their holsters, they enjoy a significant advantage over landowners and citizens, who can rarely find, much less afford, an attorney who is familiar with these laws. A federal permit process would largely solve most of these problems.

3. Little to No Coordination Among the States and the Federal Government for Routing of Interstate Crude Oil Pipelines

Since there is no primary regulatory agency that permits new interstate crude oil pipelines, there is no significant regulatory coordination with regard to route among federal, state, and local agencies. Should a state wish to reroute a pipeline that affects the route in

another state, there is no formal process to do this. If the neighboring state has not established a routing permit process, coordination may not be possible absent state enabling legislation.

When a landowner asks which agency is in charge of routing a pipeline, the answer is, "It depends," which is not a good answer for citizens. Some states have passed laws to allow a state agency to determine the route of an interstate crude oil pipeline. Other states have not. For example, Montana and Minnesota and now Nebraska regulate pipeline route, whereas South Dakota and Kansas and other states do not. However, South Dakota regulates pipeline "siting," which generally means construction mitigation. If a landowner lives near federal land or an Indian reservation, then the route may also be impacted by federal or tribal decisions. Thus, landowners may have an opportunity to seek government reroute of a project, or they may not.

Oddly enough, in the initial Keystone XL Pipeline Environmental Impact Statement ("EIS"), the DOS evaluated multiple alternative routes even though no federal agency and no state government had the authority to require many of them. This focus on specious routes and the lack of federal or state authority to route a pipeline in Nebraska meant that the first EIS did not adequately consider an alternative route around the Sand Hills in Nebraska. The Final EIS on page 4-41 states, "avoidance of the Sand Hills topographic region [and the Ogallala Aquifer] are not considered appropriate screening criteria for the identification of alternative routes." As a result, citizen pressure in Nebraska produced a new state routing law, and this was the underlying reason for most of the additional environmental review.

4. No National Planning for Development of Interstate Crude Oil Pipelines

Much of the waste caused by the current development competition between Enbridge and TransCanada, and most routing uncertainty, could be avoided by national planning for petroleum pipeline expansions and federal determination of need for proposed crude oil pipeline projects.

Crude oil pipelines are the least common, most monopolistic, one of the most expensive forms of transportation infrastructure, such that it should be planned. A major redesign of the country's crude oil pipeline system is being demanded to serve Canadian crude oil interests, but this redesign appears to be uncoordinated and is therefore wasteful.

5. No Opportunities for Public Involvement in Pipeline Safety Regulation as it Applies to Specific Crude Oil Pipelines

Landowners and other citizens are justifiably concerned about pipeline safety, yet PHMSA does not conduct pipeline-specific public hearings, except for comments on proposed safety waivers, and almost all pipeline-specific safety information in PHMSA's possession is secret, although limited amounts of information may be accessible but only after arduous Freedom of Information Act requests. This secrecy engenders deep distrust of the federal government and industry by landowners and citizens. Citizens would like assurances, other than boilerplate bald-faced ones, that PHMSA is doing its job. Due to PHMSA's current regulations and practices, landowners and other citizens have no ability to determine whether PHMSA is in fact doing its job – until after a rupture. Public oversight is one of the most effective means of assuring that agencies and the industry comply with law, but there is no practical opportunity for public watchdogs to operate with regard to pipeline safety.

6. No Opportunities for Public Involvement in Oil Spill Response Planning

Landowners and other citizens are justifiably concerned about petroleum pipeline spills, yet PHMSA excludes them from having any meaningful knowledge about pipeline spill response planning and spill response capabilities, even though such information is available from other federal agencies for tanker and refinery spills and from states that have enacted their own oil spill response laws. Spill response planning is required by the Oil Spill Act, a part of the Clean Water Act, which requires public disclosure of pipeline spill response planning materials. Regardless,

PHMSA redacts all substantive information from pipeline spill response plans released to the public, making spill response planning and preparation, for all practical purposes, a secret. This secrecy, combined with high-profile spill response failures, means that landowners and other citizens do not trust federal regulators or the industry.

7. Assignment of the Presidential Permit Process for Crude Oil Pipelines to the DOS

There is no rational reason to assign Presidential Permit review for crude oil pipelines to the Department of State, particularly as there are other federal agencies, including FERC, the Department of Energy, and PHMSA, which have substantially greater expertise than DOS with pipeline need, engineering, and economics. Moreover, the DOS is inappropriate because it has minimal statutory authority over matters with substantial domestic impacts and that involve citizen engagement. It was very odd to have the Department of State, which primary engages with foreign governments, conduct hearings about impacts to America's heartland. Since the G.W. Bush Administration, the DOS has not promulgated regulations for this process pursuant to the Administrative Procedures Act, which its sister agencies (FERC and DOE) have done for their Presidential Permit reviews. Instead, the DOS relies on a simple "fact sheet," which is vague and poorly structured.

H.R. 3301's Exemption of Border Crossings from Environmental Review Will Not Fix the Problem

Rather than fix any of the foregoing real problems related to regulation of crude oil pipeline development, H.R. 3301, Section 3(b)(3) exempts international boundary energy facility permits from federal environmental review and requires an extremely accelerated review timeframe.

If H.R. 3301 had been in effect for the Keystone XL Pipeline review, then the only state in which an environmental review would have been performed is Montana, because no other

state along the route has a mandatory environmental review process. If no comprehensive environmental review had been performed, then almost all of the landowners along the pipeline route would have had no access to information about the pipeline's impacts on them or possible ways to mitigate these impacts. Such lack of information would not have limited public involvement; it would have increased citizen fear, suspicion, and opposition, and resulted in an even more unpredictable citizen responses.

Also, if H.R. 3301 had been in effect, the climate change impacts of the proposed Keystone XL Pipeline would not have been assessed by the federal government. Thus, H.R. 3301 should be viewed as yet another attack by climate change deniers and the fossil fuel industry on efforts to protect our planet from excessive warming. Likely, some of the supporters of this bill see it as an attempt to forestall future debates about the climate impacts of fossil fuel imports and exports. H.R. 3301 won't prevent citizen action; it will just redirect it into unpredictable venues.

Far from "modernizing" pipeline regulation, elimination of environmental review for border facilities would simply help drive the regulatory process underground – hardly a sign of good government. For many landowners and citizens in the states impacted by the proposed Keystone XL Pipeline, and citizens of other states who will pay for its financial and environmental costs, the environmental review process was often the only process that helped them understand the project and that made procedural sense. For many citizens, it was their only opportunity to participate in this important national decision. Given the sorry state of the underlying pipeline regulatory "structure," if federal environmental review of the overall impacts of import and export pipelines is terminated then impacted landowners and citizens would have little to no opportunity to understand and comment on these crude oil pipeline projects. As

noted, in this situation, fear and suspicion will abound and citizen action will become increasingly unpredictable.

Moreover, exemption of import and export pipeline decisions from environmental review means that landowners and other citizens will have further evidence that the federal government is not on their side and is not to be trusted or respected. H.R. 3301 does not provide a more level playing field for all stakeholders. Instead, it lets pipeline companies burrow deeper into chaotic and complex regulatory terrain and offers landowners and citizens only a regulatory firing squad. H.R. 3301 does not foster good government and make pipeline regulatory review more predictable; it pushes it further backwards into Wild West days.

The EIS process for the proposed Keystone XL Pipeline in fact was not the primary driver of delay. Rather, all of the reworks of the EIS and the President's denial of the original permit were directly related to demands for a reroute in Nebraska and citizen outrage that no government permit process in Nebraska protected their property and environmental rights. Unlike the state permitting processes in South Dakota and Montana, which proceeded without substantial disruption, the complete lack of regulation in Nebraska meant that the only recourse citizens had was to their legislature, which resulted in passage of a new state routing law. Pursuant to this law, the state rerouted the proposed Keystone XL Pipeline and this required a new EIS.

In contrast, the environmental review and Presidential Permit processes for the first Keystone Pipeline and the Alberta Clipper did not result in substantial delays. In fact, I am not aware that environmental review and border crossing permits have in the past generally hindered crude oil pipeline construction.

Thus, what primarily delayed the review process for the proposed Keystone XL Pipeline was not too much regulation, but too little regulation. If landowners and citizens in Nebraska had been provided – from the start – with an opportunity to defend their properties, families, homes, and businesses, it is very likely that the process there would have unfolded more predictably.

Suggested Improvements to the Regulatory Review Process for New and Modified Crude Oil Pipelines

The regulatory review process at issue demands reconstruction, not tearing down the best part that proves how bad the rest of the structure is. A rational regulatory process would include the following.

- Federal permitting for new and modified crude oil pipelines by FERC, along the lines of that currently provided for natural gas pipelines, which confirms the need for new pipelines.
- Continued National Environmental Policy Act review so that citizens can learn about and comment on the significant environmental impacts of these major infrastructure projects, and thereby help to make our country cleaner, safer, and more secure.
- National planning for pipeline development to ensure that our nation's crude oil pipeline system is efficient and economical.
- A formal pipeline safety permitting process that provides the public with pipeline-specific safety information and allows public input into critical safety decisions.
- Public participation in petroleum pipeline spill response planning, so that citizens can determine if companies are truly ready to respond to spills.

Given TransCanada's unwise response to citizen concerns in Nebraska, it is likely that the crude oil pipeline industry opposes all new regulation. However, rational regulation will increase the stability of their development process because it will allow citizens to be involved in predictable

ways. Rather than oppose all new regulation on philosophical grounds, the industry should take a lesson from the chaos in the Keystone XL Pipeline process and support broader regulatory reform to create a more rational, comprehensive, open, and transparent federal permit process.

If Congress enacts H.R. 3301, the likely result will be less public information, more citizen opposition, and less opportunity for rational public debate – not better government.